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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1890.

No. 1508.

SHIBUYA JUGIRO, APPELLANT,

vs.

AUGUSTUS A. BRUSH, AGENT AND WARDEN OF SING SING PRISON, IN THE STATE OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 22, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 23, 1890.

1 To the judges of the circuit court of the United States for the southern district of New York:

The petition of Shibuya Jugiro, by Roger M. Sherman, his attorney, respectfully shows unto your honors that he is an alien friend of the United States, a subject of the Emperor of Japan, and that he is unlawfully imprisoned and restrained of his liberty, contrary to law and in violation of the VIth article and of the 14th amendment of the Constitution of the United States, by Augustus A. Brush, who is a citizen of the State of New York, as agent and warden of the State prison of the State of New York, at Sing Sing, in the southern district of New York.

The facts concerning the detention of your petitioner and the claim or authority by virtue of which he is so detained are as follows:

Your petitioner was convicted by the name of Schihiok Jugigo, in the court of oyer and terminer in the county of New York, on or about December 16, 1889, of the crime of murder, committed, as was alleged, on or about November 10th, 1889, and was sentenced by said court to be kept in solitary confinement at said prison until he should be put to death by said warden, and that said warden should cause to pass through his body a current of electricity of sufficient intensity to cause death, and that the application of such current should be continued until he should be dead. Said sentence was appointed to be carried out in the week commencing February 3, 1890; that said warden threatens to keep him in solitary confinement under said sentence until said court issues a new war-
2 rant under said sentence and conviction, fixing a time for the execution of said sentence, pursuant to section 4 of the act of June 4th, 1888, ch. 489 of the Laws of New York, and then to put him to death as aforesaid at the time so fixed.

But now so it is, may it please your honors, that the State of New York, its officers and agents, have in their possession or control for that purpose only certain dynamo electric machines by which can be generated no continuous current of electricity, but only an infinite number of distinct and entirely discontinued currents; that the use of such machine cannot cause to pass through the human body a current sufficient to cause death by its intensity, but that the use thereof will cause an infinite number of discontinued currents to pass through his body with the result that he will be carbonized from the surface of his body in until he shall yield up his life as the result of fiendish and inexpressible torture. Your petitioner further alleges that said machines are constructed only for commercial purposes for the generation of electricity for the production of electric light; that they can generate a normal force, expressed in volts, of only 1,050 volts; that such force is adequate to immediately overcome the resistance of a body, expressed in ohms, of only 23,100 ohms, and only upon a human body of that resistance can said machine inflict instant death; that while the application of the force from said machines to petitioner's body would kill him that result would only follow the reduction of his resistance gradually, while he would — meantime be

slowly tortured and consumed by heat and put in exquisite an-
3 guish by incessantly repeated shocks of his entire nervous 5
organization; that whether or not he would be unconscious during these tortures would depend upon his ability to endure pain, but that if he should be unconscious it would be because he would be unable to endure the torture and not because the centres of nerve sensation would be destroyed or because of instantaneous death. The machines and processes held out, threatened, and which only the said State, its officers and agents, have within their power or intend to use are entirely incapable of producing any other or different result, your petitioner's electrical resistance exceeding 500,000 6
ohms.

Your petitioner further alleges that no other means of artificially generating electricity now known can produce any other or different result; that the State, its officers and agents, cannot purchase or procure license to use any other dynamo electric machines, and cannot manufacture such machines, which are protected by letters patent of the United States; that no adequate machines are made or can be made for the generation of an adequate current, such as is by said sentence prescribed. It is therefore not possible to apply a current of electricity to the vital parts of petitioner's body under such conditions or in the manner contemplated by the said statute of the State of New York, and said State, its agents and officers, threaten and intend to so apply such currents, in conflict with said statute, as to torture your petitioner, or else perpetually to keep him in solitary confinement without authority of law.

4 Your petitioner is protected by the provisions of the treaties between the Emperor of Japan and the United States from the wrongs and injuries aforesaid.

Your petitioner therefore charges that the State of New York, its officers and agents, keep him in custody in violation of the VIth article of the Constitution of the United States, of the 14th amendment thereof, and without due process of law.

Your petitioner therefore prays that this honorable court do forthwith issue the writ of *habeas corpus* to the said Augustus A. Brush, agent and warden, requiring him to produce the body of said petitioner before this court at some time to be designated in said writ, there to abide what shall be awarded by said court in the premises, and at the same time he prays your honors to issue out of said court the writ of certiorari to the said court of oyer and terminer in said county and the clerk thereof, commanding it or him forthwith to certify to said circuit court of the United States true copies of the indictment, record, orders, and commitments in said court remaining under or by virtue of which said petitioner is now deprived of his liberty by authority of that court.

ROGER M. SHERMAN,
Attorney for Petitioner.

COUNTY OF NEW YORK, *ss:*

Roger M. Sherman, being duly sworn, says that he is authorized by said Shibuya Jugiro, the petitioner, to make the foregoing peti-

tion; that he has read the same and knows its contents, and
5 that the same is true to his knowledge, information, and belief.

ROGER M. SHERMAN.

Sworn to before me this 4th day of September, 1890.

ALEX. GILCHRIST,
[SEAL.] *Notary Public, Kings & N. Y. Co.*

6 United States Circuit Court.

JUDGES' CHAMBERS,
NEW YORK CITY, *Sept.* 10, 1890.

In the Matter of SHIBUYA JUIRO.

Application for Habeas Corpus.

In Kemmler's case the Supreme Court held that the statute, chap. 487 of the Laws of 1888, was not obnoxious to the provisions of the Federal Constitution (VIIIth article, 14th amendment). The papers presented upon this application do not indicate that the relator is to be punished otherwise than in accordance with the terms of that statute. The writ is refused.

E. HENRY LACOMBE.

(Endorsed:) U. S. circuit court. Filed Sept. 10, 1890. John A. Shields, clerk.

7 At a stated term of the circuit court of the United States for the southern district of New York, held in the city of New York on the 12th day of September, 1890.

Present: Hon. E. Henry Lacombe, circuit judge.

Ex Parte SHIBUYA JUGIRO.

A petition on behalf of Shibuya Jugiro, a subject of the Emperor of Japan, having been duly presented to this court for a writ of *habeas corpus* to inquire into the cause of his detention, at Sing Sing prison, in the southern district of New York, by Augustus A. Brush, Esquire, agent and warden of said prison, of said petitioner, and for relief in the premises, now, on reading and filing said petition, and after hearing Roger M. Sherman, Esq., counsel for said petitioner, it is—

Ordered that the prayer of said petition be, and the same hereby is, in all things denied.

E. HENRY LACOMBE.

(Endorsed:) U. S. circuit court, so. dist. of N. Y. Order on decision refusing writ of *hab. cor.* Roger M. Sherman, att'y for pet'r, 140 Nassau St., New York, N. Y. U. S. circuit court. Filed
8 Sept. 16, 1890. John A. Shields, clerk.

9 In the Circuit Court of the United States for the Southern District of New York.

Ex Parte SHIBUYA JUGIRO.

The petitioner, Shibuya Jugiro, conceiving himself aggrieved by the final decision of this court, declining to grant the writ of *habeas corpus* herein, doth hereby appeal therefrom to the Supreme Court of the United States, and he prays that this his appeal may be allowed, and that a transcript of the record herein may be sent to the said Supreme Court.

Dated New York, September 12th, 1890.

ROGER M. SHERMAN,
Attorney for Petitioner.

The foregoing appeal is hereby allowed, and the clerk of this court is hereby directed to send to the Supreme Court of the United States forthwith a transcript of the petition, decision, order thereupon, and of this appeal.

Dated New York, September 12th, 1890.

E. HENRY LACOMBE,
Circuit Judge.

10 [Endorsed:] U. S. circuit court, so. dist. of N. Y. *Ex parte* Jugiro. Appeal. Roger M. Sherman, att'y for app'l't, 160 Nassau St., New York, N. Y.

11 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Augustus A. Brush, Esquire, agent and warden of Sing Sing prison, in the State of New York, and Hon. Charles F. Taber, attorney general of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at the city of Washington on the second Monday in October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States, wherein Shibuya Jugiro is appellant and said Augustus A. Brush, as agent and warden, is appellee, to show cause, if any there be, why the decision in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 12th day of September, 1890.

E. HENRY LACOMBE, [SEAL.]
Circuit Judge.

ROGER M. SHERMAN,
Attorney for Appellant, 140 Nassau St., New York.

12 Endorsed: U. S. Supreme Court. *Ex parte* Jugiro. Citation. Personal service of within citation and of appeal ad-

mitted this 24th day of September, 1890. Charles F. Tabor, attorney general of the State of New York. U. S. circuit court. Filed Sep. 26, 1890. John A. Shields, clerk.

13 UNITED STATES OF AMERICA, } *sct:*
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to eleven, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the matter of the application of Shibuya Jugiro for a writ of *habeas corpus* as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this sixth day of October, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the said United States the one hundred and fifteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: S. New York C. C. U. S. No. 1508. Shibuya Jugiro, appellant, *vs.* Augustus A. Brush, agent and warden of Sing Sing prison, in the State of New York. Filed October 22, 1890.

SUPREME COURT OF THE UNITED STATES,

OCTOBER, 1890.

No. 1508.

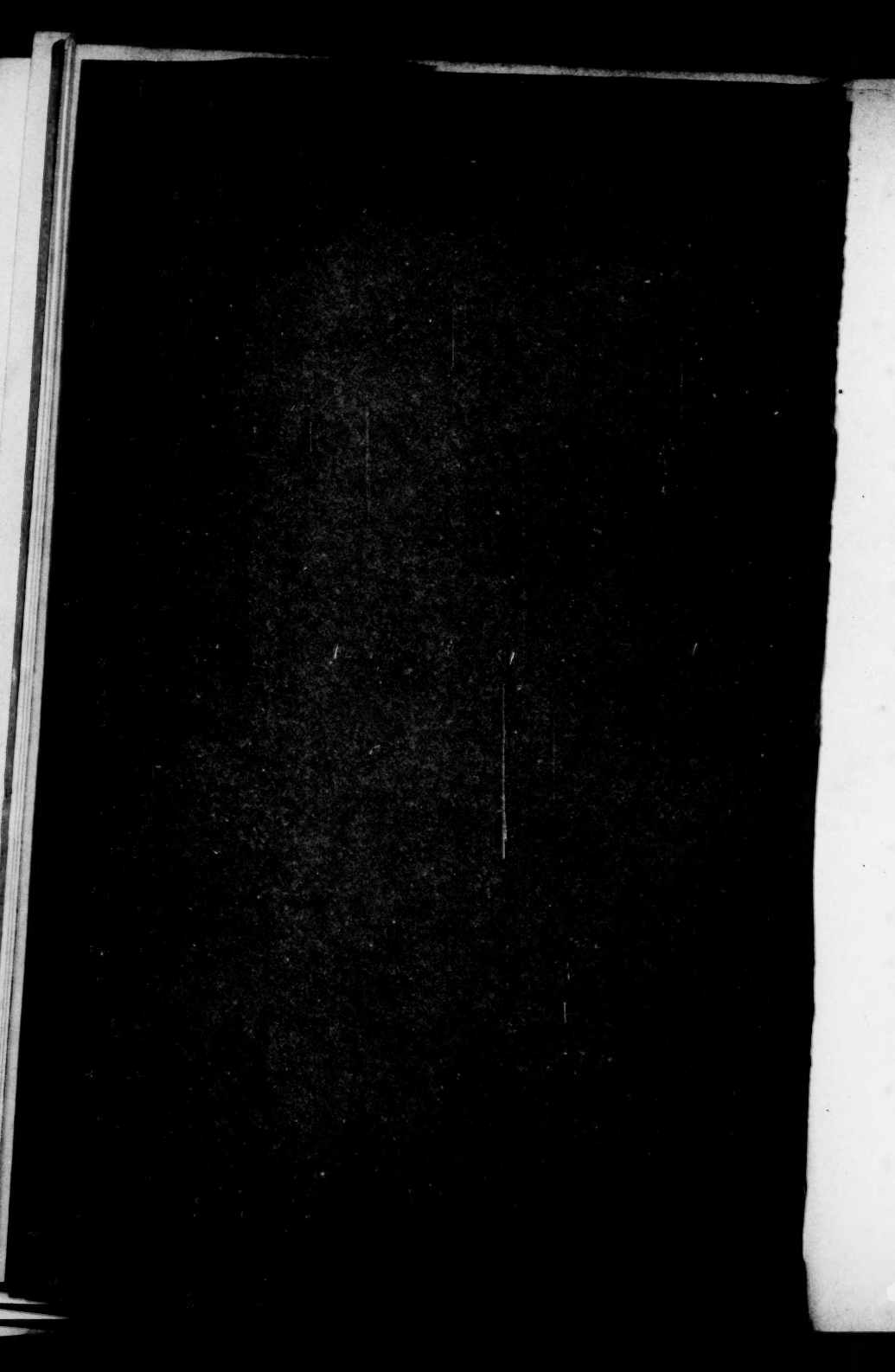
SHIBUYA JUGIRO, APPELLANT,

vs.

AUGUSTUS A. BRUSH, AGENT AND WARDEN OF SING SING PRISON, IN THE STATE OF NEW YORK.

ARGUMENT FOR APPELLANT.

ROGER M. SHERMAN,
Of Counsel for Appellant,
140 NASSAU STREET,
New York.



In the Supreme Court

OF THE UNITED STATES.

SHIBUYA JUGIRO,
Appellant,

vs.

AUGUSTUS A. BRUSH, as Agent and Warden of Sing Sing Prison,
Appellee.

Appeal from a final decision of the Circuit Court of the United States for the Southern District of New York, declining to grant the writ of habeas corpus.

ARGUMENT FOR APPELLANT.

Statement.

The appellant contends that he is in custody in violation of the constitution and treaties and laws of the United States, in this, that, being a subject of the Emperor of Japan and under sentence of death pursuant to Section 5, Ch. 489, Laws of New York, 1888, upon conviction of the crime of murder, the appellee, a citizen of New York, threatens to keep him in solitary confinement for life or to put him to death by the use of a certain dynamo-electric machine. That machine will not produce a continuous current of electricity, but only an infinite number of distinct and entirely interrupted currents. Its use will not conform to the command

of the statute by producing instantaneous and, therefore, painless death. The electrical force generated by this means will reduce Jugiro to a condition comparable to the filament of an incandescent electric light, so that he will be slowly roasted to death. The discontinuance and repetition of the current will inflict upon his nervous organization repeated shocks, and cause him inconceivable anguish.

The gear which the State of New York has furnished and which, only, can be procured for this purpose, is inadequate and incapable of producing any other result. The instantaneous passage of the maximum current which this machine will generate must be predicated upon a resistance of not more than 23,100 *ohms*. Jugiro's resistance is 550,000 ohms.

The force will therefore overcome this resistance gradually, producing in the process great friction and heat. The momentum of the force being 1,050 volts, its dynamic impulses directed immediately to the nerves will inflict torture. The machine will not produce unconsciousness by primary shock; but only as the result of excruciating agony, continued until syncope follows upon the limit of human endurance.

Argument.

This gradual burning at the wire, instead of the stake, is a refinement upon all the cruelty which the civilized advocate of capital punishment or the vindictive inhumanity of savages has ever devised.

The petition below tendered proof of these facts.

The learned Circuit Judge replied: That punishment is in accordance with the terms of the New York Statutes upon the authority of.

Kemmler's Case, 136 U. S., 436.

Upon appeal from this decision the case is now here.

This Court did not sanction any such Punishment in Kemmler's Case.

The question of the constitutionality of the New York Statute was disposed of in Kemmler's case as a question of error presented by that record.

The primary question here presented is an original one, concerning the mode in which the State of New York threatens to deal with Jugiro under a construction of that statute.

That mode and that construction, we contend, besides being erroneous, impose upon Jugiro a cruel and unusual punishment, exactly the same in its consequences to him, as if the statute itself in terms prescribed these tortures.

The statute may be without objection, but the State, its officers and agents may come within the prohibition of the Constitution, in the administration.

Ex parte Virginia, 100 U. S. 347.

It was contended in Kemmler's case that a punishment which was cruel and unusual could not be inflicted by a State, and that the Federal courts could interpose to prevent such punishment under the authority of the fourteenth amendment, and Section 753 of the Revised Statutes of the United States.

This court there says (p. 446): "If the punishment prescribed for an offense against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the Courts to adjudge such penalties to be within the constitional prohibition."

Of the expression due "process of law," the Court says: "So in the fourteenth amendment, the same words refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and

political institutions; undoubtedly the amendment forbids any arbitrary deprivation of life, liberty or property and secures equal protection to all under like circumstances in the enjoyment of their rights; and in the administration of criminal justice, requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses."

We conceive that the decision there concedes the proposition that the torture of criminals by State authority violates the Fourteenth Amendment. If there is no statute which authorizes imprisonment for life, either accompanied by the constant terrorism of threatened torture or not, the Federal Court can adjudge that the sentence is no warrant for the detention of the petitioner.

Assuming for the present that the New York Statute is not now open to challenge, we contend that it affords no warrant of law for the wrongs complained of.

THE CONSTRUCTION PLACED UPON THE STATUTE IS AS MUCH A PART OF THE STATUTE AS THE TEXT ITSELF.

Douglass *vs.* County of Pike, 101 U. S., 687.
Christy *vs.* Pridgeon, 4 Wall., 203.
Shelby *vs.* Guy, 11 Wheat., 367.

The statute was sustained by the Court of Appeals in Kemmler's case upon the statement that the mode of execution is not cruel, "because, upon the evidence there adduced, the application of electricity to the vital parts of the human body, under such conditions and in the manner contemplated by the statute, must result in instantaneous and consequently in painless death."

Kemmler *v.* Durston, 119 N. Y., at p. 579.

The statute then contemplates such an application of electricity as must result in instantaneous death, and such is the command of the statute.

The means now about to be employed are here alleged not to be capable of that effect, and it follows that the appellant is about to be executed without due process of law and in defiance of the only law upon the subject.

THE THREATENED INFLICTION, MOREOVER, CONTRAVENES THE EXPRESS COMMAND OF THE STATUTE. That command involves the use of a *continuous* current.

The history of the law and the conflicting views of experts require a literal construction of this penal Statute. There is a continuous current and there is a discontinued current. The latter, which is familiarly illustrated by the passing a continuous current through an induction coil, possesses certain important dynamic impulses, which arise not from electricity but from the interruption of its flow. To inflict the infinite number of interrupted or alternating currents, which only can be generated by this dynamo, under a prescription of a current to be continued until death is produced, is not merely an offense to language. It is as if when, for its peculiar properties, the physician prescribes iron, the nurse should proceed to bruise the head of the patient with a hammer.

THE INSTANT DEPRIVATION OF LIFE CAUSED BY THE LIGHTNING WAS CONTEMPLATED BY THE LAW MAKERS. A single stroke, quicker than anything else in nature, was to take away the breath of life. This was to be done with such rapidity that the centres of nerve sensation should be annihilated before the pain of the stroke could be felt. That was the sole view upon which the Statute was sustained. There was no pretense that the law justified a slow death, preceded by apparent unconsciousness. It was never contemplated that if the pain were so great as to pass endurance it should yet suffice that the writhing, tortured body, in its prolonged struggles for life, should appear to be what

physicians call comatose—struggling *coma!* Contradiction in terms as this may seem, such is the sole apology now extant for this mode of execution.

The broken current is the very opposite and negative of the Statute. No such departure from the terms of a penal Statute can find sanction under any conception of due process of law. There is absolutely no assurance here that in the administration of the criminal justice no different or higher punishment will be imposed upon one than is imposed on all for like offenses.

If the current may be interrupted by the peculiarity of the dynamo, it may be interrupted by the switch. If it may be interrupted many times in one minute, it may be interrupted once in many minutes.

WE INSIST THAT WE SHOULD BE PERMITTED TO SHOW WHAT OCCURRED IN KEMMLER'S EXECUTION.

We ask to prove that before he could be killed the current was not only interrupted by the dynamo, but repeatedly by the switch. The currents from the dynamo did not kill him after seventeen seconds. There was then an interval of two minutes, during which, the circuit being opened, he was struggling against the shock. His intercostal muscles were laboring to inflate his lungs. The glands of his mouth were developing saliva. His lips were quivering. Blood was pulsating from a wound in his hand, responsive to the palpitation of his living heart. His muscles were moved, not by the electrical force, for that had been turned off; but by the contraction of his tortured nerves. The pupils of his eyes were contracted. All the recognized indications of the agony of death were present.

Then the doctors cried "This man is not dead, turn on the current again."

The current then being turned on, rigidity ensued. The switch in an adjoining room was then heard to click three times, and each time the body of the poor wretch was raised from the chair. Tied

as firmly as skill and experience could devise, the effect of these shocks was to raise his body from contact with the electrode which had been placed at the base of the spine. The result was the formation of an arc. The electric force leaped the space from the electrode to the base of Kemmler's spine, with a scintillation of blue sparks. When this had been continued a number of minutes, which the horrified spectators did not record, the smell of burning flesh satisfied the scientific experts who fathered this law that the man was dead. The current was turned off. The body was found to be abnormally warm, indicating that death was slow. Despite this evidence of their nostrils, these experts, therefore, waited three hours before the body was cold enough, in their judgment, to warrant the application of the knife.

The autopsy then disclosed the utter fallacy of the theory of the law. The nerves had *not* been the preferred channel of the currents. The brain was in a normal condition, except immediately under the electrode, where it was slightly hardened. The spinal cord showed no trace of being injured in any way. The blood in some parts was baked dry, smooth and brittle. Its solid constituents were precipitated, and fell in a fine dust when rubbed between the fingers.

The heart was normal. The lungs presented normal conditions, except adhesions, which were evidence of prior disease. The spinal muscles, where the sponge had dried and the arc had formed, had been "roasted like overdone beef."

In short, almost every result predicted in our brief in the Kemmler case was realized.

There was no lesion, either of brain, heart or lungs. The track of the nerves of sensation through the spinal cord to the brain was unimpaired. There were the outer indications of prolonged death agony and the post mortem indications of slow death.

The iron and copper constituents, as well as the liquid and salts of the blood, attracted the currents, and probably made Kemmler's veins and arteries a mass of fire. Fire where the blood should bear health and life. His soul was literally burned out of him.

This was done in the name of humanity. We may well paraphrase the dying speech of Madame Roland, and say: "Oh humanity, what cruelties are inflicted in thy name!"

A scientific witness of Kemmler's death, who was present upon the invitation of the State, declares: "It was promised that the new method of getting rid of a murderer should be an improvement upon all others. History must now record its failure from many points of view. When the harrowing details of the death chamber were tingled along the telegraph wires of the country, and their impulses were throbbed through the cable, the entire civilized world viewed the scene with horror. The criminal became a martyr, and the manner of his execution was anathematized by the daily press as a disgrace to civilization. He came to it submissively, trusting to an easy death, but was killed like a writhing dog. Viewed even as a scientific operation, however, it transcended in apparent brutality anything that can be imagined. And yet this was claimed to be the true and improved way of doing it. This, too, after all the discussion by expert electricians, after all the experiments upon the lower animals, after the careful examination of the power of different machines, the accurate measurement of volts, the elaborate estimation of resistance to currents, and the exhaustive study of the generating power of different dynamos. It was the first dreadful trial on a human being to measure the terrible force of quickly repeated lightning strokes against his vital tenacity.

As now shown, there was no accurate and reliable way of determining positively when real death occurred. None of the experts dared examine the

victim while the deadly current was coursing through its circuit. No one could go near to feel the pulse or to listen to the heart beat. All the chances were taken upon the actual number of seconds required to make life extinct. That there was an error of judgment in that regard was shown in the respiratory struggles of the criminal after the first shock was administered.

All this was done for the sake of making an improvement upon other forms of execution. When, however, we compare electricide with these, we are forced to admit that it utterly failed to meet the extravagant claims of its advocates.

The scene in the death chamber was well calculated to impress any impartial observer with this fact. For the poor victim's sake, we are glad to believe that he suffered no pain; but, at the first stroke he was simply shocked, not killed. Then, after a torturingly long interval, the shock was repeated and continued until the burning flesh of his back demonstrated that the sacrifice had been complete. From the administration of the first stroke until the second circuit was finally interrupted five minutes and twenty-eight seconds elapsed."

Dr. Shrady in the Arena, October, 1890.

This is the testimony of a witness not selected by us, and whose felicity in his belief that Kemmler suffered no pain, we cannot share.

But while all this must be admitted to be the demonstration of Kemmler's execution, we will be told, as Dr. F. Shrady says: "For the poor victim's sake, we are glad to believe that he suffered no pain."

Virgil tells us that men readily believe what they wish to be true.

We invite attention to the eminent scientific authority upon this execution, of no less value that it was uttered *ante litem motam.*

In 1837 Professor Manni founded in the Institute of France a prize for the best treatise upon the

signs of death and the means of preventing premature interment. This prize was awarded after ten years' competition, in 1848, to Doctor Bouchut. The treatise and the report of the commissioners to whom the question was, by the French Academy of Sciences, referred, contain probably as instructive an essay upon the subject as the world can furnish. Particular attention was given to the effect of electricity in suspending the vital functions and to the indications of agony. Some quotations from that work illustrate our present contention.

Traité des Signes de la Mort, par E. Bouchut.

Ouvrage Couronné par l'Institut de France.

Paris, Libraire de l'Académie Nationale de Médecine, 1849.

The following conclusions established by that authority tend to enlighten us upon this occurrence:

At page 38, Bouchut says agony is the name given to the phenomena preceding death which accompany the struggle between the vital forces and annihilation.

Then the man, almost entirely deprived of the use of intelligence, of his senses, and of his muscular functions, falls into a condition of more or less troubled slumber. The pupil is always contracted in agony, as it is in sleep, and it only becomes dilated at the moment of death. The body appears to be the scene of an internal combat. Life will be the prize of victory.

There are men in whom life is very tenacious and with whom the struggle against death is very violent. They defend themselves if one may so express it, and only succumb after violent and painful efforts. There are others, on the other hand, who fall at once and die without having resisted.

(39.) But in deaths which are called *sudden*, and which result from an instantaneous lesion of the heart or of the brain, the agony endures only a few minutes. The man who is thus suddenly struck

down, loses consciousness, his ideas and his senses are confused, his pupil is contracted as if he wished to sleep, the use of his muscular functions disappears and he dies in some minutes after having exhibited all the most important phenomena of agony.

Whatever, then, may be the cause of death, it is always preceded by precursory symptoms more or less evident, and we should be wrong to think that one can die without agony. Very painful and prolonged with some, it is very short with others. That is all the difference.

In respect to the signs of real death, this treatise accepts three, first and highest in importance being placed the prolonged cessation of the heart beat upon auscultation. The other signs of real death are the simultaneous relaxation of all the sphincters, due to the paralysis of these muscles; and the sinking of the ball of the eye and the loss of the transparency of the cornea.

Respecting the failure of the heart beat it is declared (p. 43): The beating of the heart becomes slower and enfeebled by degrees; although perceptible to the ear, long after the hand placed upon the breast can no longer feel it. Consequently, and it is a remark of importance in the history of apparent death, those who before the epoch of auscultation have judged of death from the absence of heart beat with the hand have been often mistaken, and always will commit the most deplorable errors if they persist in that practise.

(45.) The pulse ceases to make itself perceived four minutes before the last respiration.

(92.) As to asphyxia by electricity the author says: The thunderbolt strikes, burns and throws a man down, while leaving him his faculties or, else, strikes him deprived of sensation to the point of making him pass for dead, when, in truth, he is not dead. This state of apparent death one sees so rarely that it has not been well studied; but it merits some attention. If we may judge by the

effect of electricity upon animals, that which we call asphyxia may be only syncope, and in this condition there is only diminution of the force and frequency of the beatings of the heart.

Upon a rabbit put by a strong charge of electricity into a state of apparent death, the stethoscope enabled us to count the beatings of the heart at 30 or 40 a minute; then the animal was revived by a little repose, but if we continued the experiment until the disappearance for many minutes of the beatings of the heart upon auscultation, life ceased and it became impossible to revive it.

(370.) The report of the Commissioners asserts that auscultation has demonstrated, in a crowd of cases, the persistence of the heart beat where the radial pulse was completely absent, and in which the cardiac movement was not perceptible to the hand.

(375.) The Messieurs Weber have demonstrated that one can suspend the movements of the heart for more than two minutes, by applying to it the poles of an electro-magnetic apparatus, and that the heart can immediately after resume its regular movements.

* * * * * *

The Commissioners thought it their duty to call these experiments to the attention of physicians who are called upon to examine the state of the heart in the cases of apparent death caused by lightning, and in which the suspension of the movements of the heart can be more considerable than ordinary, without, nevertheless, being confounded with their definitive cessation.

Examples are given of many instances of persons in catalepsy, who have been buried alive, but who preserved all their consciousness until exhumation, and were able to recount what had gone on around them during the period of apparent death. While many such instances are rejected as apochryphal, many are also accepted as true.

(386.) The complete loss of sensation and movement is compatible with life. But the definitive cessation of the beatings of the heart, ascertained with the stethoscope, is a certain sign of death.

The stethoscope was not applied to Kemmler before the knife.

Kemmler's struggles plainly show that the motor nerves were intact. There is absolutely no reason, therefore, to suppose that the nerves of sensation were not likewise performing their functions. The appearances of syncope are, therefore, necessarily due to the effect of the sensations upon the registering ganglia of the brain. In other words, the man, if insensible, was so from torture.

In a recent discussion which has excited general attention in regard to the conduct of Stanley's rear guard in Africa, an occurrence is mentioned which illustrates our contention of the effect of pain.

We are told that a man was sentenced to 300 lashes, which were applied to his bare back. After the first 30 strokes he did not utter a sound; the pain had made him insensible. But he died of the cruel punishment. Were the last 170 lashes not as cruel as the first?

No instance is known where in the infliction of punishments judically recognized as cruel and unusual, unconsciousness did not precede death, after a longer or shorter period, depending upon the endurance of the sufferer. This was true of the wheel, of the rack, of the *peine forte et dure*, of the Knout, of every violent death known to history.

Nor is the suddenness of the infliction any certain assurance against pain.

Bouchut's Treatise, above cited, after giving a graphic picture of the decapitation of a sheep where the death of the brain occurred two or three minutes after (p. 132, 133), concludes, "I do not know if in the time which passes between the decapitation and the relaxation of the pupils, the brain yet living, preserves the integrity of its functions and the exercise of thought; but if it does, it must be con-

fessed that this short instant must be very terrible for the animal."

If then Jugiro may be heard in a Federal Court to complain of the mode in which this statute is to be carried out, and he make good his allegations in that behalf, the State of New York cannot put him to death.

CAN THE STATE OF NEW YORK, UNDER THAT STATUTE, IMPRISON HIM FOR LIFE?

The sentence of death is in full force. All that the Court can do further is to fix a time for its execution. He is then, from day to day, living in solitary confinement, in the dread of this threatened torture. The prospect before him is only of perpetual imprisonment, with the added fear that it will be shortened only by this inhuman end.

The provisions of the Statute which can be invoked to justify this imprisonment are merely incidental to the main purpose of the Statute. That failing, can the incident be exalted into the substantive prescription of the law?

Has the Legislature of New York, by inadvertence, changed the punishment of murder to solitary confinement for life?

If so, that result will meet with the approval of many humane men throughout the State and the world. At the last session of the New York Legislature the very impending dread of the Kemmler execution secured a majority of the Assembly for a bill directly to secure this result.

But that view can hardly consist with the following authorities:

Trade Mark Cases, 100 U. S., 99.
Allen *vs.* Louisiana, 103 U. S., 84.
Virginia Coupon Cases, 114 U. S., 304.

In the Trade Mark Cases Mr. Justice Miller says: "It is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished."

In the Virginia Coupon cases Mr. Justice Matthews, says:

"The substantive part of it * * cannot stand * * that which is merely auxiliary to the main design must also fall within the principle of which it is merely an incident. There may be cases where one part of a statute can be enforced * and another declared inoperative * * but these are cases where the parts are so distinctly separable that each can stand alone, and where the Court is able to see and to declare that the intention of the legislature was that the part pronounced valid should be enforceable even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature, one they may never have been willing by itself to enact."

It may well be contended that if this statute be now construed as a statute imposing imprisonment for life, it is a change of decision which is to all intents and purposes the same as an amendment of the law by legislative enactment.

Douglass *vs.* Pike, 101 U. S., at p. 687.

As to this crime and petitioner the law thus changed by construction is *ex post facto* and void.

But this construction leads to obvious absurdity, and the petition alleges that no other means of artificially generating electricity now known can produce any other or different result than the torture alleged. WE ARE FORCED TO THE RECONSIDERATION OF THE CONSTITUTIONALITY OF THE STATUTE ITSELF.

WITH DIFFERENT PARTIES, UPON A DIFFERENT RECORD, AS AN ORIGINAL QUESTION, WITH NEW AND CONVINCING FACTS, IN A QUESTION OF LIFE AND DEATH AND IN A CASE OF HABEAS CORPUS, THE DECISION OF THE COURT OF APPEALS IN KEMMLER'S CASE IS NO BAR TO THIS PETITION. THE DOCTRINE OF *stare decisis* DOES NOT APPLY.

Lindsay *vs.* Lindsay, 47 Ind., 286.
Snyder *vs.* Gascoigne, 11 Tex., 455.

Baker *vs.* Lorillard, 4 N. Y., 261.
Boon *vs.* Bowers, 30 Miss., 256.
Bane *vs.* Wick, 6 Ohio St., 13.
Kneeland *vs.* Milwaukee, 15 Wis. 691.
Willis *vs.* Owen, 43 Tex., 48.
Exparte Robinson, 6 Mc L., 360.
Lea *vs.* White, 4 Sneed, 73.
Exparte Ring, 28 Cal., 247.
In re Cusley, 34 Iowa, 184.
Hammond *vs.* People, 32 Ills. 446.
McFarland *vs.* Johnson, 27 Tex. 105.
Exparte Lawrence, 5 Binn., 304.
Exparte Campbell, 20 Ala., 89.

In Willis *vs.* Owen, 43 Tex., 48, the Court says: "The doctrine grows out of the necessity for a uniform and settled rule of property. But when the former decision is not of this character * * the former decision or previous construction is received and weighed merely as an authority tending to convince the judgment of the correctness of the particular conclusion, and not as a rule to be followed without inquiring into its correctness."

In Kneeland *vs.* Milwaukee, 15 Wis., 691, the Court says:

"The maxim *stare decisis* has a greater or less force according to the nature of the question decided. * * As an illustration, take a case involving personal liberty. A party restrained of his liberty claims to be discharged under some constitutional provision; the Court erroneously decides against him; the same question arises again. To change such a decision would destroy no rights acquired in the past; it would only give a better protection to rights in the future. The maxim in such a case would be entitled to very little weight, and mere regard for stability ought not to be allowed to prevent a more perfect administration of justice."

In Post *vs.* Supervisors, 105 U. S., 669, the opinion contains an implication, perhaps, favorable to the present contention.

MR. JUSTICE GRAY:

"An act of the legislature of a State which has been held by its highest court not to be a statute of the State because never passed as its constitution requires, cannot be held by the courts of the United States *upon the same evidence* to be a law of the State."

The rule *stare decisis* cannot be applied to shut out advanced knowledge.

San Francisco *vs.* S. W. W. W., 48 Cal., 509.
McFarland *vs.* Pico, 8 Cal., 631.
Callendais Adner *vs.* Ins. Co., 23 Penn. St., 474.

THE QUESTION OF CONSTITUTIONALITY IS HERE AN OPEN AND ORIGINAL QUESTION.

The proposition considered by the Court of Appeals in

Kemmler *vs.* Durston, 119 N. Y., 577, is thus stated:

"This legislation is assailed in no other way than by attempting to show that the new mode of carrying out a death sentence subjects the person convicted to the possible risk of torture and unnecessary pain. * * * * *

Every act of the Legislature must be presumed to be in harmony with the fundamental law until the contrary is clearly made to appear.

If it cannot be made to appear that a law is in conflict with the Constitution by argument deduced from the language of the law itself, or from matters of which a court can take judicial notice, then the act must stand.

The testimony of experts is not admissible to show that in carrying out a law enacted by the Legislature, some provision of the Constitution may possibly be violated.

If the act upon its face is not in conflict with the Constitution, then extraneous proof cannot be used to condemn it."

The question, however, in the Circuit Court upon the evidence now tendered is *res nova.*

Loring *vs.* Marsh, 2 Cliff., 469.
Neal *vs.* Green, 1 McL., 18.
Pease *vs.* Peck, 18 How., 598.

If the rule above stated by the Court of Appeals, excluding from consideration evidence bearing upon the question of cruelty, is to be applied to proof of the actual results of the experiment which that court sanctioned, then that rule is in conflict with numerous authorities in this court. Upon a question of conflict with the Federal Constitution that decision is not authority here.

Louisville Co. *vs.* Palmer, 109 U. S., 256.
Butz *vs.* Muscatine, 8 Wall., 582.
Ohio L. & T. Co. *vs.* Debolt, 109 U. S., 244, 256.
Douglass *vs.* County of Pike, 101 U. S., 687.
Burgess *vs.* Seligman, 107 U. S., 33.

This court has declared in

Gelpecke *vs.* Dubuque, 1 Wall., 206,

Mr. Justice Swayne:

"We shall never immolate truth, justice and the law, because a State tribunal has erected the altar and decreed the sacrifice."

THE DECISION BELOW SHOULD BE REVERSED AND A MANDATE GRANTED FOR THE ISSUE OF THE WRIT AS PRAYED.

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In the Supreme Court

OF THE UNITED STATES.

SHIBUYA JUGIRO,
Appellant,

vs.

AUGUSTUS A. BRUSH, Agent and Warden of Sing Sing Prison.

Statute of New York referred to in the petition. Laws of 1888.

Chapter 489.

An Act to amend sections four hundred and ninety-one, four hundred and ninety-two, five hundred and three, five hundred and four, five hundred and five, five hundred and six, five hundred and seven, five hundred and eight, and five hundred and nine of the Code of Criminal Procedure, relative to the infliction of the death penalty, approved by the Governor, June 4th, 1888. Passed, three-fifths being present. The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1.—Section four hundred and ninety one of the Code of Criminal Procedure of the State of New York is hereby amended so as to read as follows:

§ 491. When a defendant is sentenced to the punishment of death, the judge or judges holding the Court at which the conviction takes place, or a majority of them, of whom the judge presiding must be one, must make out, sign and deliver to the Sheriff of the County, a warrant stating the conviction and sentence, and appointing the week within which sentence must be executed. Said warrant must be directed to the Agent and Warden of the State Prison of this State designated by law as the place of confinement for convicts sentenced to imprisonment in a State Prison in the judicial district wherein such conviction has taken place, commanding such Agent and Warden to do execution of the sentence upon some day within the week thus appointed. Within ten days after the issuing of such warrant, the said Sheriff must deliver the defendant, together with the warrant, to the Agent and Warden of the State Prison therein named. From the time of said delivery to the said Agent and Warden, until the infliction of the punishment of death upon him, unless he shall be lawfully discharged from such imprisonment, the said defendant shall be kept in solitary confinement at said State Prison, and no person shall be allowed access without an order of the Court, except the officers of the prison, his counsel, his physician, a priest or minister of religion, if he shall desire one, and the members of his family.

§ 2. Section four hundred and ninety-two of said Code of Criminal Procedure is hereby amended so as to read as follows:

§ 492. The week so appointed must begin not less than four weeks and not more than eight weeks after the sentence. The time of the execution within said week shall be left to the discretion of

the Agent and Warden to whom the warrant is directed; but no previous announcement of the day or hour of the execution shall be made, except to the persons who shall be invited or permitted to be present at said execution, as hereinafter provided.

§ 3. Section five hundred and three of said Code of Criminal Procedure is hereby amended so as to read as follows:

§ 503. Whenever, for any reason other than insanity or pregnancy, a defendant sentenced to the punishment of death has not been executed pursuant to the sentence at the time specified thereby, and the sentence or judgment inflicting the punishment stands in full force, the Court of Appeals or a judge thereof, or the Supreme Court or a Justice thereof, upon application by the Attorney General or of the District Attorney of the county where the conviction was had, must make an order directed to the Agent and Warden or other officer in whose custody said defendant may be, commanding him to bring the convict before the Court of appeals or a General Term of the Supreme Court in the department, or a term of the Court of Oyer and Termnier in the county where the conviction was had. If the defendant be at large, a warrant may be issued by the Court of Appeals or a Judge thereof, or by the Supreme Court or a Justice thereof, directing any Sheriff or other officer to bring the defendant before the Court of Appeals or the Supreme Court at a General Term thereof, or before a term of the Court of Oyer and Terminer in that county.

§ 4. Section five hundred and four of said Code of Criminal Procedure is hereby amended so as to read as follows:

§ 504. Upon the defendant being brought before the Court, it must inquire into the circumstances,

and if no legal reason exists against the execution of the sentence, it must issue its warrant to the Agent and Warden of the State Prison mentioned in the original warrant and sentence under the hands of the judge or judges or a majority of them, of whom the judge presiding must be one, commanding the said Agent and Warden to do execution of the sentence during the week appointed therein. The warrant must be obeyed by the Agent and Warden accordingly. The time of the execution within said week shall be left to the discretion of the Agent and Warden, to whom the warrant is directed, but no previous announcement of the day or hour of the execution shall be made, except to the persons who shall be invited or permitted to be present at said execution as hereinafter provided.

§ 5. Section five hundred and five of said Code of Criminal Procedure is hereby amended so as to read as follows:

§ 505. The punishment of death must in every case be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death and the application of such current must be continued until such convict is dead.

§ 6. Section five hundred and six of said Code of Criminal Procedure is hereby amended so as to read as follows:

§ 506. The punishment of death must be inflicted within the walls of the State Prison designated in the warrant or within the yard or inclosure adjoining thereto.

§ 7. Section five hundred and seven of said Code of Criminal Procedure is hereby amended so as to read as follows:

§ 507. It is the duty of the Agent and Warden to be present at the execution and to invite the pres-

ence by at least three days' previous notice, of a Justice of the Supreme Court, the District Attorney and the Sheriff of the county wherein the conviction was had, together with two physicians and twelve reputable citizens of full age, to be selected by said Agent and Warden. Such Agent and Warden must, at the request of the criminal, permit such ministers of the Gospel, priests or clergymen of any religious denomination, not exceeding two, to be present at the execution, and in addition to the persons designated above, he may also appoint seven assistants or Deputy Sheriffs who may attend the execution. He shall permit no other person to be present at such execution except those designated in this section. Immediately after the execution a *post mortem* examination of the body of the convict shall be made by the physicians present at the execution and their report in writing, stating the nature of the examination so made by them, shall be annexed to the certificate hereinafter mentioned and filed therewith. After such *post mortem* examination the body, unless claimed by some relative or relatives of the person so executed, shall be interred in the graveyard or cemetery attached to the prison with a sufficient quantity of quick lime to consume such body without delay, and no religious or other services shall be held over the remains after such execution, except within the walls of the prison where said execution took place, and only in the presence of the officers of said prison, the person conducting said services and immediate family and relatives of said deceased prisoner. No account of the details of any such execution beyond the statement of the fact that such convict was on the day in question duly executed according to law at the prison shall be published in any newspaper.

Any person who shall violate or omit to comply with any provision of this section shall be guilty of a misdemeanor.

§ 8. Section five hundred and eight of said Code of Criminal Procedure is hereby amended so as to read as follows:

§ 508. The Agent and Warden attending the execution must prepare and sign a certificate setting forth the time and place thereof, and that the convict was then and there executed in conformity to the sentence of the Court and the provisions of this Code, and must procure such certificate to be signed by all persons present and witnessing the execution. He must cause the certificate, together with the certificate of the *post mortem* examination mentioned in the preceding Section and annexed thereto, to be filed within ten days after the execution, in the office of the clerk of the county in which the conviction was had.

§ 9. Section five hundred and nine of said Code of Criminal Procedure is hereby amended so as to read as follows:

§ 509. In case of the disability from illness or other sufficient cause of the Agent and Warden to whom the death warrant is directed, to be present and execute said warrant, it shall be the duty of the principal keeper of said prison, or such officer of said prison as may be designated by the Superintendent of State Prisons, to execute the said warrant, and perform all the other duties by this Act imposed upon said Agent and Warden.

§ 10. Nothing contained in any provision of this Act applies to a crime committed at any time before the day when this Act takes place. Such crime must be punished according to the provisions of law existing when it was committed, in the same manner as if this Act had not been passed; and the provisions of law for the infliction of the penalty of death upon convicted criminals, in existence on the day prior to the passage of this Act, are continued in existence and applicable to all crimes punishable

by death, which have been or may be committed before the time when this Act takes effect. A crime punishable by death committed after the beginning of the day when this Act takes effect, must be punished according to the provisions of this Act, and not otherwise.

§ 11. All Acts and parts of Acts inconsistent with the provisions of this Act are hereby repealed.

§ 12. This Act shall take effect on the first day of January, one thousand eight hundred and eighty-nine, and shall apply to all convictions for crimes punishable by death committed on or after that date.

FILED.
NOV 19 1890
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 1508.

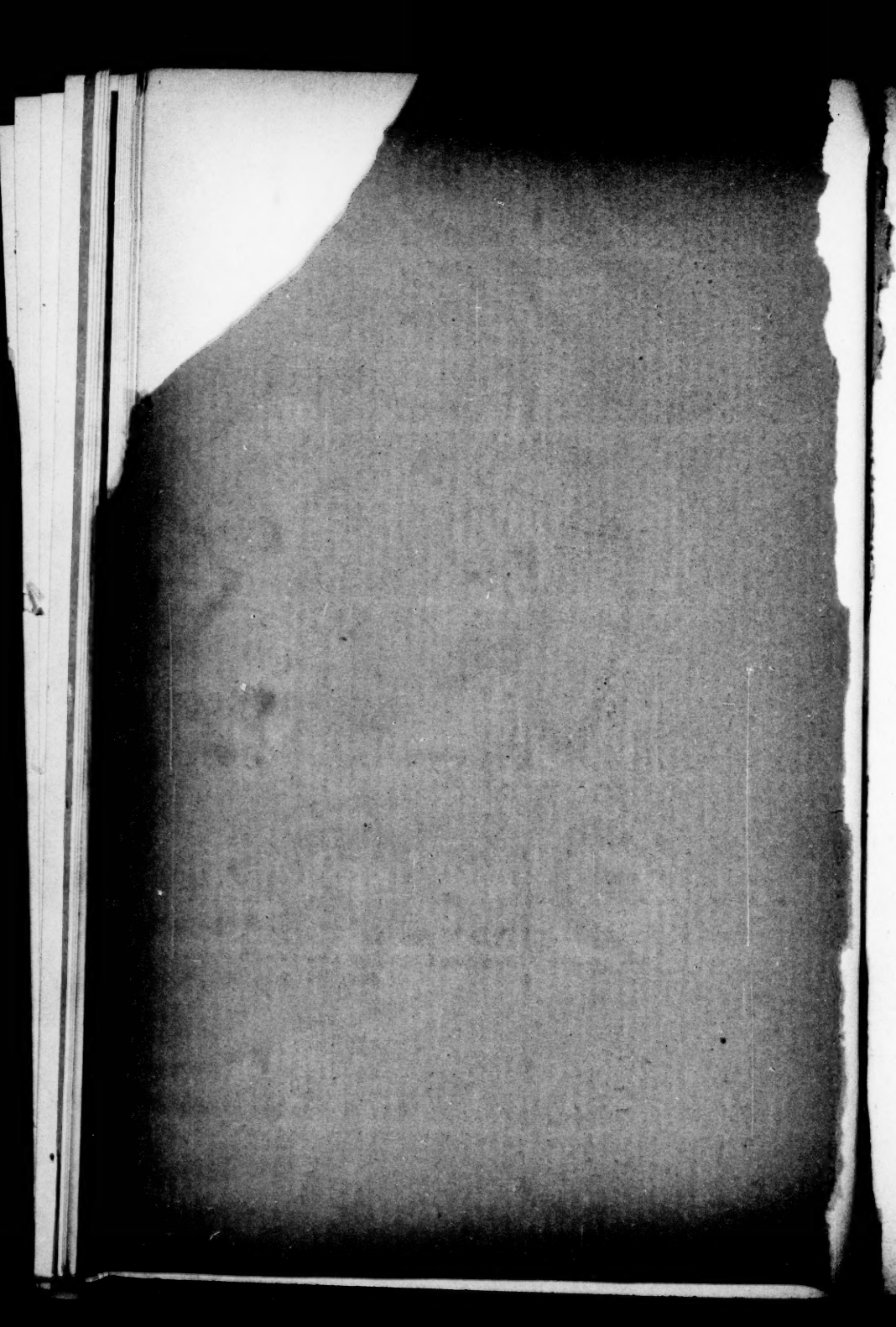
SHIBUYA JUGIRO, APELLANT,

against

AUGUSTUS A. BRUSH, AGENT AND WARDEN OF SING SING PRISON, IN THE STATE OF NEW YORK.

BRIEF FOR AGENT AND WARDEN.

CHARLES F. TABOR,
Attorney-General of New York,
Of Counsel, Albany, N. Y.



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SHIBUYA JUGIRO, APPELLANT,

against

AUGUSTUS A. BRUSH, AGENT AND WARDEN OF SING SING PRISON, IN THE STATE OF NEW YORK.

STATEMENT.

On or about December 16, 1889, the appellant, by the name of Schihiok Jugigo, was convicted in the court of Oyer and Terminer in the county of New York, State of New York, of the crime of murder, and was sentenced by said court to be put to death, in pursuance of the provisions of the act of the State of New York, passed June 4, 1888, being chapter 489, Laws of 1888 of said State. The judgment imposed upon him required the sentence to be carried out in the week commencing February 3, 1890, in the manner provided for in the act of the Legislature of the State of New York referred to. (Fols. 1, 2.)

On the 12th day of September, 1890, a petition on behalf of the appellant was presented to the Circuit Court of the United States for the Southern District of New York, for a writ of habeas corpus, to inquire into the cause of the detention at Sing Sing prison, by the agent and warden of

said prison, of said Jugiro, and by said Circuit Court of the United States for the Southern District of New York, the prayer of the petition was in all things denied.

From the order made by the Circuit Court of the United States for the Southern District of New York, upon said petition, the appellant appealed to this court, and the appeal was allowed on the 12th day of September, 1890, by Hon. E. Henry Lacombe, Circuit Judge of the United States for the Southern District of New York. (Fol. 9.)

The appellant, in his petition, alleged that the State of New York had in its possession only certain dynamo-electric machines by which can be generated no continuous current of electricity, but only an infinite number of distinct and entirely discontinued currents, which machines were constructed only for commercial purposes, and that while the application of the force from said machines to his body would kill him, that the result would only follow from the reduction of his resistance gradually, while he would meantime be slowly tortured and consumed by heat, and put in exquisite anguish by incessantly repeated shocks of his entire nervous organization; that the petitioner's resistance exceeds 500,000 ohms; that no adequate machines are made or can be made for the generation of an adequate current such as is by the sentence prescribed, and it was therefore not possible to apply a current of electricity to the vital parts of his body, under such conditions, or in the manner contemplated by the statute of the State of New York, and the attempt to apply such current would be to torture him. The petition also alleges that the appellant is protected by the provisions of the treaties between the Emperor of Japan and the United States, and that he is kept in custody in violation of the sixth article of the Constitution of the United States and of the fourteenth amendment thereof.

POINTS.

I.

The allowance of the writ of habeas corpus was not a matter of right, but rested to a great extent in the discretion of the court.

In *ex parte* Milligan (4 Wall, 2), the court held, where the cause of imprisonment is fully shown by the petition, the court may, without issuing the writ, consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged.

In re Hoover (30 Federal Reporter, 51), the District Court, Southern District of Georgia, Speer, Justice, held: "A clear, irreconcilable antagonism between the Federal law and the State law must be shown, to allow the writ."

In *ex parte* Royall (108 U. S., 252, 253), the court said: "If it is apparent upon the petition that the writ, if issued, ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it * * * ; and the court is not deprived of discretion as to the time and mode in which it will exert the powers conferred upon it."

Ex parte Terry (128 U. S., 289, 301, 302), is to the same effect.

The latter case was decided subsequent to the passage of the act of March 3, 1885, chapter 353, Twenty-third Statutes at Large, 437, amending section 764, R. S. U. S.

II.

By proceeding in the manner in which this matter has been brought to the attention of the court, we submit that the writ of habeas corpus can not be converted into a writ of error by which

the judgment of the courts of the State of New York passing the sentence, can be reviewed.

Such was the doctrine laid down in *ex parte* Yarbrough (110 U. S., 651), where the court further held that if the court below had jurisdiction of the party and of the offense for which he was tried, and had not exceeded its powers in the sentence which it pronounced, this court can inquire no further.

To the same effect is *ex parte* Siebold (100 U. S., 371, 375); and *in re* Hoy (127 U. S., 731); *in re* Lane (135 U. S., 446).

That the courts of the State of New York had jurisdiction of the person of the appellant, Jugiro, and of the offense for which he was tried, and that it has not exceeded its powers in the sentence imposed upon him, has been determined, not only by the courts of the State of New York, but by this court, and that there was jurisdiction of the person and of the offense, and the powers of the court have not been exceeded in the sentence, is not denied by the petition.

"The general averment, in the petition, that he was detained in violation of the Constitution and laws of the United States, and that the District Court had no jurisdiction or authority to try and sentence him, in the manner and form above stated, is an averment of a conclusion of law, and not of facts, that would, if found to exist, displace the presumption the law makes in support of the judgment." (Cuddy, Petitioner, 131 U. S. Rep., 286.)

The application is based upon the inability, so alleged, of the State to carry into effect the sentence so imposed; and for that reason it is said that the fourteenth amendment to the Constitution of the United States will be violated by the agent and warden of Sing Sing prison, in

attempting to carry out the commands of the courts of the State of New York.

In re Kemmler (136 U. S., 447), this court held "that the decision of the New York State courts, sustaining the validity of the act under the State Constitution, was not re-examinable here; nor was that decision against any title, right, privilege or immunity specially set up or claimed by the petitioner under the Constitution of the United States. Treating it as involving an adjudication that the statute was not repugnant to the Federal Constitution, that conclusion was so plainly right that we should not be justified in allowing the writ upon the ground that error might have supervened therein. * * * Undoubtedly the fourteenth amendment forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all, under like circumstances in the enjoyment of their rights, and in the administration of criminal justice, requires that no different or higher punishment shall be imposed upon one than is imposed upon all, for like offenses. But it was not designed to interfere with the power of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order. The enactment of this statute was in itself within the legitimate sphere of the legislative power of the State, and in the observance of those general rules prescribed by our system of jurisprudence, and the Legislature of the State of New York determined that it did not inflict cruel or unusual punishment, and its courts have sustained that determination. We can not perceive that the State has thereby abridged the privileges or immunities of the petitioner, or deprived him of due process of law."

III.

The Court of Appeals of the State of New York in the Kemmler case expressly held as follows: "If it can not be made to appear that a law is in conflict with the Constitution, by argument deduced from the language of the law itself, or from matters of which a court can take judicial notice, then the act must stand. The testimony of expert or other witnesses is not admissible to show that in carrying out a law enacted by the Legislature some provision of the Constitution may possibly be violated."

This language of the Court of Appeals was cited by the learned Chief Justice in the opinion delivered *In re* Kemmler in this court. (See case *supra*, 443.)

And this court further said in this same opinion, "In order to reverse the judgment of the highest court of the State of New York we should be compelled to hold that it had committed an error so gross as to amount in law to a denial by the State of due process of law to one accused of crime, or of some right secured to him by the Constitution of the United States. We have no hesitation in saying that we can not do this upon the record before us."

It would seem, therefore, that the case of Kemmler, so recently decided by the Court of Appeals and by this court, would be a sufficient answer to the petition made to the Circuit Court in behalf of the appellant.

That the State of New York *has* sufficient machinery to carry out the law for the punishment of offenses, and especially of the crime of murder, was clearly established in the Kemmler case and is further evidenced by the fact that Kemmler has been executed. Of this fact the court may take notice, because it is a matter that has been given wide publicity, and if a prisoner held under a law adjudged constitutional by the courts of the State and of the United

States can procure *habeas corpus* upon the facts set forth in the petition in this case, there is no reason why any other convict would not be entitled to the writ, by the mere statement that the straps upon the chair in which the convict was to be fastened were not of sufficient strength to hold him, or for any other reason that the genius of counsel might suggest.

IV.

The authorities of the State of New York are endeavoring to enforce the laws that have been enacted for the protection of the people of the State of New York, and a speedy determination of the questions presented here should be had, in view of the fact that other convicts are now under sentence of death in that State, and it is confidently submitted, in view of the determination of this court made in the case of Kemmler, that this appeal should be dismissed, or the order made denying the writ of *habeas corpus* affirmed.

CHARLES F. TABOR,
Attorney-General, Attorney for the State of New York.

AUGUSTUS A. BRUSH,
Warden of Sing Sing Prison.